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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET. AL.,
Appellees.

APPELLANT'S PETITION AND BRIEF FOR REHEARING AND RECONSIDERATION.

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The Daily Record Co. Print, Baltimore

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Now comes appellant, Claiborne-Annapolis Ferry Company, by counsel, and respectfully petitions this Court for a rehearing herein and a reconsideration of its opinion announced on April 11, 1932, upon the following grounds and for the following reasons, more elaborately discussed in its brief hereto appended:

1. The Court inadvertently (it is believed) held that a suit to set aside a certificate of public convenience and necessity of the Interstate Commerce Commission for the extension of a line must be brought under Paragraph 20, Section 1, of the Transportation Act (under which the procedure has always been before a single judge, followed by an appeal to a Circuit Court of Appeals and *cer-*

tiorari from this Court) rather than under Section 212 of the Judicial Code (originally the Commerce Court Act, June 18, 1910, Chap. 309, 36 Stat. at L. 542; Comp. St. Sec. 1005).

2. The Court inadvertently (it is believed) stated that no person other than appellant objected before the Interstate Commerce Commission to the issuance of the certificate.

3. The Court inadvertently inaccurately stated appellant's basis of attack on the certificate and then decided the case by disposing of such inaccurate statement.

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BRIEF FOR APPELLANT IN SUPPORT OF PETITION FOR REHEARING AND RECONSIDERATION.

The decision in this case involves much more than appellant's property rights. It directly concerns the sovereignty of the State of Maryland. If counsel correctly construe it, it divests the State of Maryland (and every other state) of jurisdiction over local vehicular ferries forming a part of their respective public highway wherever such ferries are located in the vicinity of a railroad and vests control thereof in the Federal Government. Such a revolutionary step in the direction of centralization warrants, we believe, a re-examination of the opinion in the respects hereinafter indicated.

I.

THE COURT INADVERTENTLY HELD THAT THIS SUIT WAS BROUGHT UNDER PARAGRAPH 20, SEC. 1, OF THE TRANSPORTATION ACT.

The opinion states that

> "the right of appellant Ferry Company to institute and maintain this proceeding *rests wholly upon the permission granted by Paragraph* 20, *Sec.* 1. 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission." (Italics ours.)

The opinion then holds, in substance, that a void certificate is no certificate at all, and that, where a carrier is proceeding under a void certificate (as claimed in the case at bar), the right to institute and maintain a suit to set it aside "rests wholly upon the permission granted by Paragraph 20, Sec. 1."

This statement, it is believed, was inadvertent and will confuse what has, up to this time, been the well settled procedure in cases of this sort. A proceeding to set aside an order of the Interstate Commerce Commission has heretofore always been instituted under Section 212 of the Judicial Code (originally the Commerce Court Act, June 18, 1910, Chap. 309, 36 Stat. at L. 542; Comp. Stat., Sec. 1065). This section was omitted from the United States Code Annotated, but it has never been repealed and is still the law. *Baltimore and Ohio Railroad Company, et al., vs. United States, et al.* (Chicago Junction Case), 264 U. S. 258, 68 L. ed. 667.

Paragraph 20, Sec. 1, of the Transportation Act was believed, up to this time, to apply to cases where no

certificate, *in fact*, had been secured from the Interstate Commerce Commission but abandonment or extension by a carrier had nevertheless been undertaken. See *Western Pacific California Railroad Company vs. Southern Pacific Company*, decided November 23, 1931, Oct. Term, 1931, No. 51.

Any proceeding under Section 212 of the Judicial Code must be had before a special three-judge court provided for by Tit. 28, Sec. 47, U. S. C. A., from which court an appeal lies direct to this Court. See *Transit Commission, etc., vs. United States*, decided January 4, 1932. A proceeding under Paragraph 20, Sec. 1, has always been before a single judge from whose decision it has never been believed that a direct appeal would lie. See *Western Pacific, etc., vs. Southern Pacific Company, supra.*

Hence, when this Court holds in the instant case, that the right to maintain the suit "rests wholly upon the permission granted by Paragraph 20, Sec. 1," it has thrown into confusion a hitherto well-settled procedural matter.

It is believed that the portion of the opinion just discussed, or at least the statement that the right to maintain the action "rests wholly upon the permission granted by Paragraph 20, Sec. 1," was inadvertent and that the Court would wish to strike it from its opinion.

II.

THE STATE OF MARYLAND OBJECTED BEFORE THE COMMISSION TO THE ISSUANCE OF THE CERTIFICATE.

Passing now to what we consider to be the second inadvertence in the opinion, it is stated that the Claiborne-Annapolis Ferry Company, appellant here, intervened before the Commission and that "no other party asked

to intervene or *offered objection to the requested certificate.*" (Italics ours.)

The Court apparently overlooks the fact that, whereas the State of Maryland offered no objection to the Railway Company's application *to extend its line by ferry,* nevertheless, as soon as it became apparent to the Public Service Commission of Maryland that the so-called "extension" was merely a pretext for securing permission from the Interstate Commerce Commission to establish a general vehicular ferry, it filed a most vigorous protest with the Interstate Commerce Commission (see R., pp. 40-41).

While this fact may be of small importance at the moment, it may very well be that, at a later date, the State of Maryland may seek its day in court in connection with the matters here in controversy, at which time, should such a course of action materialize, it would be obviously unfair for this Court to have intimated in its present opinion that the State of Maryland offered no objection to the certificate while the matter was before the Interstate Commerce Commission.

The Court will recall that the Attorney General of Maryland appeared here as *amicus curiae.*

III.

THE MAIN QUESTION IN CONTROVERSY.

Upon the question involving the merits of the case, the opinion is as follows:

> "The bill (in the Court below) alleged that the order and certificate were null and void and without effect because the evidence before the Commission showed the carrier lacked corporate power to operate the ferry and had no actual use therefor in connection with its road; *also, that no present or future*

public necessity and convenience required such operation. (Parenthesis and italics ours.) * * *

* * * "Here, undoubtedly, the Commission had power to entertain and act upon the Railway's petition, also to grant the certificate of public convenience and necessity upon sufficient evidence. If the record discloses such evidence, the certificate is not a nullity and the Ferry Company has no right now to demand decision on any other question.

"We think there was enough evidence—when material and conflicting we may not pass upon its weight—to support the Commission's conclusion. A large district on the Eastern Shore of Chesapeake Bay lacks adequate railroad connection with Washington and points beyond. The possibilities of the proposed ferry, operated as a part of the railway's line, were disclosed and the Commission's conclusion that material advantages to the public would result from additional facilities for interstate transportation is not without support.'"

It is believed that the Court has inadvertently incorrectly stated appellant's position in the Court below and in this Court. The claim was not

"that no present or future public necessity and convenience required" the establishment of the ferry. On the contrary the claim was

(1) That there was no evidence whatsoever disclosing any need or use for a railroad ferry, i. e., a ferry to be used or operated as an extension of the rail line; and

(2) That the alleged need for a general ferry, in the absence of a showing of a need for a railroad ferry, was insufficient to support the Commission's certificate. See Bill of Complaint, Par. 9, R., pp. 5-6; Assignment of Errors, Nos. 1 and 3, R., p. 51.

It is most respectfully insisted that, especially in view of the impairment of state sovereignty here involved, both appellant and the State of Maryland are entitled to a decision upon the questions actually raised and which have not been decided, viz—

1. Does the alleged need for a general or vehicular ferry between two points entirely within the State of Maryland authorize the Interstate Commerce Commission to issue its certificate, in the absence of any showing of a need for a railroad ferry?

2. If the answer to No. 1 is in the negative, then where has this Court found one scintilla of evidence in the record showing any need or use whatsoever for a railroad ferry?

We refer the Court, in connection with Question 2, to pages 24 to 34 of our original brief and pages 6 to 8 of our reply brief.

We refer again to the Court's opinion that "we think there was enough evidence * * * to support the Commission's conclusion."

The opinion does not refer to any evidence in the record as to the *public need* for a *railroad ferry*, and we submit that there is none.

All of the evidence before the Interstate Commerce Commission related to the applicant's attempt to show the need for a general or vehicular ferry. There was no evidence as to the amount of any ferry business to be done as an extension of the railroad line, and no evidence that the ferry would be or could be anything other than an operation independent of and not connected with the railroad, from point to point within the State of

Maryland. There was, we submit, no evidence that would warrant this Court in approving the usurpation of the powers of the Public Service Commission, and in transferring its jurisdiction to the Interstate Commerce Commission.

The curtailment of State sovereignty is, we believe, still a grave, even though now a not uncommon, phenomenon. Since the earliest days of the government, local ferries have been under the jurisdiction and control of the several states. If that jurisdiction is now to be lodged elsewhere—which is the inescapable result of the present opinion—it should not be done in the absence of unambiguous and compelling reasons therefor. The opinion in this case is wholly ambiguous as to the exact basis upon which it disposes of the issue. It cannot be clarified, we believe, without a discussion of the two questions indicated above. We believe and submit that both appellant and the State of Maryland are entitled to enlightenment upon these two points.

We further believe and submit that when these two matters are re-examined the Court will conclude that the certificate was without sufficient basis to support its validity.

CONCLUSION.

It is, therefore, respectfully urged that a rehearing be granted.

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